SUPREME COURT, U. S.

FILED
MAY 29 1969
JOHN F. DAVIS, CLERK

IN THE UNITED STATES SUPREME COURT

October Term 1968

No. 1109

EDNA WEED,
Petitioner,
vs.
OWEN BILBREY, SR., GLADYS BILBREY,
OWEN BILBREY, JR., PHYLLIS BILBREY,
JAMES E. THOMPSON, JR., and
PAULA THOMPSON, d/b/a
OWEN BILBREY FRUIT COMPANY and
JAMES E. THOMPSON, JR., Individually,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

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TABLE OF CONTENTS

		Page
I	STATEMENT OF THE CASE	1
II	INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT AS GROUNDS FOR PETITION FOR REHEARING	1
III	CONCLUSION	4
IV	CERTIFICATE OF GOOD FAITH PURSUANT TO RULE 58	6
V	CERTIFICATE OF SERVICE	6

TABLE OF CASES

Page

MORAGNE, ET AL v.
STATE MARINE LINES, INC.

5 Cir. 1967 (case No. 24198) 1
Fla., 1968, 211 So. 2d 161 2
5 Cir. 1969 (case No. 24198) 2

TUNGUS v. SKOVGAARD

1959, 358 U. S. 588; 79 S. Ct. 503;
3 L. Ed. 2d 524 4

I

STATEMENT OF THE CASE

This Court, by order dated May 5, 1969, denied the Petition herein for a Writ of Certiorari to the Supreme Court of Florida. Three Justices, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennen, were of the opinion that certiorari should have been granted. The underlying issue was whether the Florida Courts were bound to apply maritime law to a wrongful death case occurring on Florida navigable waters when such action was brought pursuant to the Florida Wrongful Death Statute. The contention of the petitioner, of course, was that the Florida Courts were bound by the Federal Constitution or Federal Maritime Law to apply comparative negligence to the case. The Florida Supreme Court had ruled that Florida tort principles of contributory negligence as opposed to comparative negligence were applicable.

For the reason that intervening circumstances have occurred in the cause, which the petitioner believes are of substantial effect here, the petitioner makes this petition for rehearing.

II

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT AS GROUNDS FOR PETITION FOR REHEARING

On August 11, 1967, in the case of *Moragne, et al. v. State Marine Lines, Inc.*, 5 Cir. 1967 (case No. 24198), the United States Court of Appeals for the Fifth Circuit certified to the Florida Supreme Court, under Florida Appellate Procedure, the question as to whether the Florida Death Statute gave rise to an action based on unseaworthiness where a long-

shoreman had been killed on Florida navigable waters. The Florida Supreme Court answered in the negative on May 29, 1968, Fla. 1968, 211 So. 2d 161, (rehearing denied July 3, 1968). A copy of the opinion of the Florida Supreme Court answering the certified question was annexed to the original petition for certiorari herein as appendix C.

At the time the petition herein was filed, the counsel for the plaintiff in the *Moragne* case had filed an application in the United States Court of Appeals for the Fifth Circuit to disregard the answer of the Florida Supreme Court to the certified question, arguing that the Constitution or Federal Law required application of admiralty principles to wrongful death cases arising out of incidents on Florida navigable waters. The Fifth Circuit accepted briefs and oral arguments on the question and had that issue and application under advisement when the petition herein was filed.

On April 1, 1969, the Fifth Circuit in the said *Moragne* case denied the application of the plaintiff longshoreman in the *Moragne* case to disregard the answer of the Florida Supreme Court. The Court held that it was up to the Courts of the State of Florida to determine whether the Florida State Wrongful Death Act encompassed the admiralty concept of unseaworthiness.

The counsel for the longshoreman in *Moragne* has now filed a petition for a writ of certiorari to the United States Supreme Court from the decision of the Fifth Circuit which affirmed the striking of unseaworthiness from a wrongful death complaint under the circumstances above described. That petition is now pending before the United States Supreme Court. The basic federal questions in *Moragne* and in this case are the same. If the petition in *Moragne* is granted and if the United States Supreme Court assumes jurisdiction in *Moragne*, and determines that the Florida Courts are duty bound by the

Federal Constitution and/or by Federal Maritime Law to apply admiralty principles such as unseaworthiness, then in the same vein the Florida Court would be duty bound to apply the doctrine of comparative negligence rather than the Florida state tort doctrine of contributory negligence in this case. In short, should this Court rule in favor of the petitioner-plaintiff in *Moragne*, that ruling would govern the law applicable to petitioner in this case as well. The petition in *Moragne* is now pending in this Court and petitioner here respectfully suggests that this is an intervening circumstance which occurred subsequent to the filing of the petition for certiorari in the within case and indeed occurred subsequent to the denial of certiorari in this case.

Since the decision of this Court in *Moragne* will directly bear upon the issue which was presented to this Court in the instant case, the petitioner herein respectfully requests that a rehearing be granted so that this matter can be considered along with the petition in *Moragne*. We feel this is important so that the essentially identical rights of the parties can consistently be determined rather than potentially inconsistently determined by reason of the fortuitous circumstance of the timing of the petitions to this Court.

Finally, as of May 5, 1969, it appears that the membership of the Court will be changed with the resignation of Mr. Justice Fortas.

Public announcements from Washington have also indicated that Mr. Chief Justice Warren will retire from the Bench around June 16, 1969. *Moragne* cannot be considered by this Court before that date and probably not for some reasonable time thereafter due to the summer adjournment of the Court.

The closeness of the question presented here is attested to by the fact that three Justices were of the opinion that the

original petition in this case should have been granted. In the apparent controlling authority, *Tungus v. Skovgaard*, 1959, 358 U. S. 588, 79 S. Ct., 503, 3 L. Ed. 2d 524, this Court was closely divided (five to four) on this same issue. A new Justice, of course, will replace Mr. Justice Fortas and Mr. Chief Justice Warren. This means that membership of the Court will be changed by at least one Justice and probably two Justices before *Moragne* is determined by this Court. On an issue of such importance as this, where the Court was divided to begin with, it is respectfully requested that the matter be reconsidered with the new Justice or Justices being given the opportunity to consider it and to present his or their views to the rest of the Court. Mr. Justice Fortas and Mr. Chief Justice Warren, of course, were with the majority which denied the petition herein. The circumstance of the resignation of Mr. Justice Fortas and the imminent retirement of Mr. Chief Justice Warren, it is respectfully submitted, is an intervening circumstance of substantial effect.

III

CONCLUSION

It is respectfully requested that the petition for rehearing herein be granted and, in the interest of consistency in the law, that the order denying the petition for certiorari be reconsid-

ered, along with the recently filed petition in *Moragne*. The petitioner believes that she has demonstrated intervening circumstances of substantial effect herein.

Respectfully submitted,

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By /s/
Frederick William Wagner

IV

CERTIFICATE OF GOOD FAITH PURSUANT TO RULE 58

The undersigned counsel, on behalf of the petitioner herein, certifies to this Honorable Court that the petition for rehearing is presented in good faith and not for delay and the petition is restricted to grounds of intervening circumstances of substantial effect. The petitioner certifies that the petition for rehearing is restricted solely to such grounds.

Respectfully submitted,

/s/.....

Frederick William Wagner

V

CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that three true copies of the foregoing Petition for Rehearing of Order Denying Petition For Writ of Certiorari and Certificate of Good Faith Pursuant to Rule 58 was mailed this 28 day of May, 1969 to Mr. William A. Gillen of Fowler, White, Collins, Gillen, Humkey & Trenam, Box 1438, Tampa, Florida, attorneys for Respondents.

/s/.....

Frederick William Wagner